Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

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NO. 76-1353

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THOMAS E. KUYKENDALL,

PETITIONER

VS

SOUTHERN FARM BUREAU CASUALTY INSURANCE COMPANY,

RESPONDENT

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# PETITIONER'S MOTION FOR REHEARING

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I.

The opinion of the Court of Appeals affirming the judgment of the District Court was rendered on November 29, 1976. The motion



for rehearing was denied on January 3, 1977. On February 4, 1977, a letter was sent by Respondent's attorneys to Petitioner's attorney, stating that the testimony of an employee of the Respondent given on the trial was not accurate, and that the true facts were as set forth in the letter. See page 10 of the Petitioner's Petition for a Writ of Certiorari, and Appendix thereto, pages D-1 and D-2. It is apparent that this testimony was extremely important to the Petitioner not only for trial purposes, but for other purposes such as negotiating settlements and the like. A Motion for Relief from the Judgment has been filed with the District Court. Said Motion reads as follows:

" (number and style omitted)

MOTION FOR RELIEF FROM JUDGMENT

TO THE HONORABLE THE SAID COURT:

Plaintiff, Thomas E. Kuykendall, files this his Motion for Relief from Judgment under the provisions of Rule 60 of the Federal Rules of Civil Procedure and as grounds therefore respectfully states:

" I

This case was filed on March 1, 1974, by Petitioner and his father, C. R. Kuykendall, to recover moneys alleged to be owing by the defendant, Southern Farm Bureau Casualty Insurance Company, to the Plaintiff under a certain policy of insurance issued by defendant to the father of petitioner for the cost of settlement and expenses incurred by him in settling a claim by a person the petitioner had shot. The father's case was severed and remanded to State Court where it is presently pending. On December 3, 1974, the case was tried before a



jury, and on December 4, 1974, the Court granted Defendant's Motion for an Instructed Verdict. On March 3, 1975, a memorandum and order was filed by the Trial Court in which the Court stated that the motion for a directed verdict was granted in the following terms:

> 'Briefly, the Court concluded there was a failure to give proper notice under the policy; the injury was not covered by the policy; and the settlement amount paid was, in part, for considerations other than Guillen's personal injuries, but no apportionment was shown.'

A copy of the Trial Court's Memorandum and Order is attached hereto as Exhibit "A".

" II

On the trial of this case, the adjuster for the defendant company testified as follows:

'THE COURT: Mr. Foster, did you know that Mr. Kuykendall had counsel at the time you tape recorded this?

THE WITNESS: Had what, sir?

THE COURT: Had a lawyer, had Counsel, had an Attorney?

THE WITNESS: No, sir, I did not.

THE COURT: Did you ask him?

THE WITNESS: I don't remember.

THE COURT: Go ahead.'

Questions by Mr. Hornberger:

'Q Mr. Foster, I must assume that you misunderstood the Court when the Court asked you whether you knew that Mr. Kuykendall had Counsel at the time you took this interview because the interview expressly showed that you knew he had Counsel.

A Yes, sir.



Q And you told the Court you didn't know it?

A Apparently I did know it.

Q Yes, sir. (See pages 198 and 199 of Statement of Facts).

Further on the trial of this case, the following proceedings were had:

'THE COURT: Well, I understand that. The only thing that bothers me about it--of course, not receiving a copy of the citation of the original filing, that is important. I can understand that. I just have a hard time getting by the--I guess I'm having a hard time getting by your witness not telling me the truth, for one thing.

MR. FINCK: Judge, I'm sorry about that. I mean, Ihad no control over the thing.

THE COURT: That is probably what the problem is with me, that is giving me more

trouble than anything else. Because he went down there, and I've seen the transcript of what he asked, about an accident, and--

MR. FINCK: Well, sir, the only thing I can say to the Court is that--

THE COURT: --Then his perfunctory way of forgetting to go by and see Mr. Hornberger after he finally talked with his client to me is just wrong. I never did like it when I was practicing law, and I represented insurance companies when I was practicing law, I didn't like the idea of an adjuster going to see a man who had a lawyer without calling the lawyer.

MR. FINCK: I agree with the court wholeheartedly on that, and, of course, this Counsel was not consulted in anything on that."

* * *. (See pages 229 and 230 of Statement of Facts).



Further on the trial of this case, Mrs. Jesse H. Plocek, an employee of the defendant company, testified as follows:

"Q All right, have you checked this file to see whether you had any loss notice from Mr. C. R. Kuykendall for an incident that happened on or about 6-19-71?

A I have.

Q What have you found?

A I have no record of such.

Q Do you have any independent recollection of Mr. Kuykendall calling you on the phone to report this incident of a shooting?

A That's been a long time ago, but I have no recollection of ever talking to Mr. Kuykendall.

Q If Mr. Kuykendall had called you and told you about a shooting on his property, would you have filled out a loss notice?

A I would have.

Q And you couldn't find one?

A No, sir."

(See pages 188 and 189 of Statement of Facts).

" III

An appeal was taken by the Plaintiff to the Court of Appeals for the Fifth Circuit, and, after oral argument, the judgment of the trial court was affirmed in an unpublished opinion. A copy of such opinion is attached hereto as Exhibit "B". This opinion was dated November 29, 1976. A Petition for Rehearing was denied on January 3, 1977.



" IV

On February 4, 1977, the attorneys for the defendant company wrote to the attorney for the plaintiff advising him that the witness, Plocek, had recently remembered that in fact she did receive notice of the loss in question. The letter stated in part:

"This is to advise you that on January 31, 1977, Jessie Plocek who was a witness in the Federal Court suit, Civil Action 74 L 6 , Thomas E. Kuykendall vs Southern Farm Bureau Casualty Insurance Company, telephoned me to say that she now recollected talking to Mr. Kuykendall on the phone about the incident in question, that she filled out a loss notice, that the agent at the time was

Ottomar E. Hugo and the adjuster was Durwood Koehler, that Ottomar came in and after reading the loss notice and discussing the incident Durwood said that there was no coverage and to throw the thing in the trash and that Durwood did that." * * *.

A copy of this letter is attached hereto as Exhibit 'C'. It is respectfully called to the attention of the Court that the information from Defendant's attorneys as to the mistaken testimony was not sent to Petitioner's attorney until the case had been fully and finally decided by the Court of Appeals.

Depositions of Jessie Plocek, Ottomar E. Hugo and Durwood Koehler, are to be taken in Cause No. 28,973, styled C. R. Kuykendall vs Southern Farm Bureau Casualty Insurance



Company, being the companion case of this civil action, on the 9th day of June, 1977. Said Cause No. 28,973 is now pending in the 111th District Court of Webb County, Texas.

" V

A petition for Writ of Certiorari was filed in the Supreme Court of the United States on April 4, 1977, and on May 16, 1977, that petition was denied. A copy of the letter advising plaintiff of the denial is attached hereto as Exhibit 'D'. The petition for Writ of Certiorari reads in part as follows:

' By letter dated February 4, 1977, a copy of which appears at Appendix D, the petitioner's attorney was advised by the Respondent's attorney that the testimony that an employee of the Respondent Insurance Company gave on the trial of this case was not accurate,

and that the true facts are as set forth in this letter. A motion to vacate the judgment of the District Court is being filed with the District Court under the provisions of Rule 60 (b) of the Federal Rules of Civil Procedure.'

" VI

The Trial Court, the Court of Appeals and the Supreme Court have all followed the decision of the Texas Court of Civil Appeals in Winn v Continental Casualty Co., 494 SW2 601, in spite of:

(a) That case has no writ history.

(b) The facts in Winn were entirely different from the facts in the case at hand.

(c) The fact that Art. 38.06 (formerly Art. 428 of the old Penal Code) of the new Penal Code of Texas makes it an offense to solicit, accept, or agree to accept any benefit



in consideration of abstaining from, discontinuing, or delaying the prosecution of another for an offense. See such Articles attached hereto as Exhibit 'E', and that any testimony by plaintiff concerning any alleged apportionment would make him guilty of a criminal offense and the agreement void.

" VII

It is clear that the Defendant's witness, Foster, lied on the witness stand. It is now clear that the defendant's witness, Plocek, withheld, by mistake or otherwise, evidence of great value to the Plaintiff and of the greatest importance to the Plaintiff in establishing his case and conducting settlement negotiations and the trial. To permit a party to withhold this testimony and reveal it only after an appellate court has ruled violates every principle of equity known to the law. Because of

this conduct on the part of the defendant company, its agents and employees, this Court should set aside its judgment of March 3, 1975, and grant the Plaintiff a new trial. To do so will also allow the Courts of Texas, in the companion case, No. 28,973, C.R. Kuykendall vs Southern Farm Bureau Casualty Insurance Company, to affirm or overrule the unfair and unwise decision in the Winn case.

WHEREFORE, Petitioner prays that this Motion be granted and that the judgment of March 3, 1975, be set aside and a new trial ordered.

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Laredo, Texas 78040
Attorneys for Petitioner
(Plaintiff) Thomas E.
Kuykendall

by: S/ J.G. Hornberger "

* * * * * * * * * * *



(The attachments to the above Motion are not included herein, as such attachments are included in the Petition for Writ of Certiorari heretofore filed herein).

II.

It is respectfully called to the attention of the Court that the information from Respondent's attorneys as to the mistaken testimony was not sent to Petitioner's attorney until the case had been fully and finally decided by the Court of Appeals.

III.

The Motion for Relief, together with the Petitioner's Petition for a Writ of Certiorari make it clear that the Petitioner was not given the fair and impartial trial to which he is entitled under the Constitution and Laws of the

United States.

Therefore, it is respectfully submitted that this Court, in the exercise of its supervisory power, should reverse the judgments of the Court of Appeals and the District Court and order a general remand of the case for a new trial on all issues. See Marshall v U.S., 360 US 310.

Respectfully submitted,

J. G. HORNBERGER
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Laredo, Texas 78040
Attorneys for Petitioner,
Thomas E. Kuykendall

by J. G. Hornberger



I certify that a copy of Petitioner's Motion for Rehearing was mailed to Mr. Edward R. Finck, Jr., Clemens, Spencer, Welmaker & Finck, 1805 NBC Building, San Antonio, Texas 78205, on the 27th day of May, 1977.

J. G. Hornberger

CERTIFICATE OF COUNSEL

I, the undersigned counsel, certify that this Motion for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 Section 2 of the Rules of the United States Supreme Court.

J. G. Hornberger